Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DANTE ADAMS,

Petitioner,

v.

STATE OF INDIANA
DEPARTMENT OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Indiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fourth Amendment's exclusionary rule preclude the use of unconstitutionally seized drugs in the Indiana controlled substance excise proceeding where that tax has been held to be so punitive as to constitute a punishment for double jeopardy purposes?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Indiana Supreme Court is reported at 762 N.E.2d 728. A petition for rehearing was denied without opinion at 2002 Ind. LEXIS 524.

JURISDICTION

The opinion of the Indiana Supreme Court was entered on February 8, 2002. A timely petition for rehearing was denied on June 7, 2002. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The relevant provisions of the Indiana Controlled Substance Excise Tax statute, I.C. 6-7-3 et seq., and is reproduced at App. 18-22.

STATEMENT

In March of 1998 Adams was served with a tax assessment pursuant to Indiana's Controlled Substance Excise Tax (CSET). He immediately began the protest process and raised a claim under the Fourth Amendment of the Constitution. Adams pursued the protest – pressing his Fourth Amendment claim – through review by the Indiana Department of Revenue (Department) where he lost. He pursued an appeal to the Indiana Tax Court. He prevailed in that appeal, specifically on his Fourth Amendment claim. *Adams v. Dep't of Revenue*, 730 N.E.2d 840 (Ind. Tax. 2000) [App. 13-17]. The Tax Court held that the Fourth Amendment's exclusionary rule extends to "Indiana's CSET when it is clearly based on judicially determined illegally seized evidence." *Id.*, at 843.

The Department pursued review of the Tax Court's decision by the Indiana Supreme Court. On February 8, 2002, by a 3-2 vote, the Indiana Supreme Court reversed the decision of the Tax Court [App. 1-11]. The Indiana Supreme Court defined the issue thusly, "we therefore must determine whether the cocaine must be suppressed in the CSET proceedings under the federal exclusionary rule." *State v. Adams*, 762 N.E.2d 728, 730 (Ind. 2002).

This case arose in 1997. An Indianapolis Police officer, Michael Turner, obtained a search warrant for a safe deposit box which was in Adams' name. The box was opened and cocaine was discovered. Adams was charged with a criminal offense in Marion County Superior Court. Adams filed a Motion to Suppress arguing that the seizure of the cocaine was unconstitutional. The trial court agreed with Adams and suppressed the cocaine. The State chose

not to appeal and moved to dismiss the charges against Adams.

On March 23, 1998, the day before the criminal charges against Adams were dismissed, the Department of Revenue issued a jeopardy tax assessment against Adams under Indiana's CSET. The CSET provides for a tax to be levied against people who possess controlled substances. The Indiana Supreme Court has found that the tax amounts to a punishment for Double Jeopardy purposes. *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995). The state court's decision was premised upon this Court's decision in *Montana Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994).

Pursuant to the tax assessment, a tax warrant issued immediately. That warrant permitted revenue officers and others to enter Adams' home to begin the immediate collection of the tax. Among the officers who assisted in the search pursuant to the tax warrant was Officer Turner, the officer responsible for the unconstitutional 1997 search. In the course of serving the tax warrant, cocaine was discovered in Adams' house. That cocaine gave rise to a new criminal case.

Thus in 1998, Adams was pursuing litigation in two forums, the tax protest and the new criminal case. In both of those forums Adams raised the argument that the Fourth Amendment's exclusionary rule precluded the use of the cocaine illegally seized from the safe deposit box. In the criminal case, Adams again filed a motion to suppress which was denied and he pursued an interlocutory appeal. The Indiana Court of Appeals granted Adams relief and held that the subsequent entry into Adams home in 1998, based upon the illegally seized 1997 cocaine, was barred

by the exclusionary rule. *Adams v. State*, 726 N.E.2d 390 (Ind. App. 2000).

The State petitioned for transfer to the Indiana Supreme Court. That court granted transfer but affirmed the decision of the Court of Appeals. *State v. Adams*, 762 N.E.2d 737 (Ind. 2002). Thus, Adams ultimately prevailed in the second criminal case and that case has been dismissed. Thus, it is not a part of this petition.

This case squarely presents the question of whether the Fourth Amendment's exclusionary rule precludes the use of unconstitutionally seized drugs in the Indiana controlled substance excise proceeding where that tax has been held to be so punitive as to constitute a punishment for double jeopardy purposes.

REASONS FOR GRANTING THE WRIT

At the time *Kurth Ranch* was decided, approximately 23 states had similar drug tax statutes. *Kurth Ranch,* 511 U.S. at 795. Indiana joined the pack in 1994. Thus, the issue presented in this petition is one that is undoubtedly presenting itself in both civil and criminal courts throughout this country.

It is uncontested that the original search in this matter was unconstitutional. As the Indiana Supreme Court noted in the opinion below, "Both parties concede that the search of the safe deposit box violated Adams's federal constitutional right to be free from unreasonable searches and seizures." *Dep't of Revenue v. Adams*, 762 N.E.2d at 730. The issue presented in this petition is thus far-reaching in its implications but narrow in scope: what,

if any, role does the Fourth Amendment play in a state CSET proceeding?

Other state courts have concluded that the Fourth Amendment does require exclusion in the context of controlled substance tax cases. *Vara v. Sharp*, 880 S.W. 2d 844 (Tex. App. 1994). *Vara* relied upon this Court's decision in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) in which this Court held that the exclusionary rule applied to civil forfeiture proceedings because of their quasi-criminal nature. *Vara* also noted that this Court has held that certain constitutional protections normally reserved for criminal proceedings apply to civil proceedings of a quasi-criminal nature. See, *Austin v. United States*, 509 U.S. 602 (1993).

In *Austin,* this Court held that forfeiture proceedings historically have been understood, at least in part, as punishment, and were therefore subject to the limitations of the Eighth Amendment's excessive fines clause. *Austin*, 509 U.S. at 618. Thus, under this line of cases, the more punitive the proceeding, the greater the constitutional protections afforded, including the application of the exclusionary rule. Indiana's CSET is punitive in nature and as a consequence the Fourth Amendment's exclusionary rule must apply.

In *Weeks v. United States*, 232 U.S. 383 (1914), this Court held that evidence seized in violation of the Fourth Amendment is not applied in a federal criminal proceeding. In *Mapp v. Ohio*, 367 U.S. 643 (1961), this Court made that ruling to state criminal proceedings. In *United States v. Janis*, 428 U.S. 433 (1976), this Court held that evidence which was illegally seized by state officials could be used in federal tax proceedings. The majority concluded that

state law enforcement officers would not be significantly deterred by a rule that excluded the evidence from federal criminal prosecutions. *Janis* noted the distinction between "intrasovereign" violations and "intersovereign" violations. In the former, the exclusionary rule had been applied to civil cases. *Id.* 428 U.S. at 456, n.2.

As with most cases applying the exclusionary rule, *Janis* looked to balance the social benefits of applying the rule against the cost of excluding evidence. Lower federal courts have since elaborated on this balancing test. *Wolf v. C.I.R.*, 13 F.3d 189 (6th Cir. 1993) set forth five factors relevant to the application of the exclusionary rule in a civil proceeding: 1) the nature of the proceeding; 2) whether the proposed use of unconstitutionally seized material is inter or intrasovereign; 3) whether the search and secondary proceeding were initiated by the same agency; 4) whether there is an explicit and demonstrable understanding between the two governmental agencies; and 5) whether the secondary proceeding fell within the "zone of primary interest" of the officers that conducted the search. *Id.*, at 194-95.

The first *Wolf* factor – the nature of the proceeding – clearly points in Adams' favor and toward exclusion. This was no mere tax proceeding. This was a punitive tax so far removed from an ordinary tax as to be considered a punishment for double jeopardy purposes. *Bryant, supra.* In *Bryant* the Indiana Supreme Court noted the deterrent effect of the tax and that it was not merely about raising revenue.

The CSET only applies to those who have violated Indiana's controlled substance laws. This was another fact noted by *Bryant* in examining the nature of this tax. This

tax only applies to those who deliver, possess, or manufacture controlled substances. This distinguishes both *Tirado v. C.I.R.*, 689 F.2d 307 (2nd Cir. 1982) and *Wolf, supra,* in which the civil proceedings were for federal income tax which applies universally. Similarly, the CSET is imposed only after a taxpayer's drugs have been confiscated. Clearly, the taxpayer neither enjoys a privilege nor performs an act at the time of taxation, unlike an excise tax.[1]

The second *Wolf* factor – whether the proposed use of unconstitutionally seized material is inter or intrasovereign – points unflinchingly toward exclusion. In this case, both the taxing authority and the law enforcement officers were criminal agents of the State of Indiana. It must also be noted that this is a factor which was emphasized as important in *Janis*. *Janis* is an important case in this context as it involved state actors and a federal tax. This case involves state actors and a state tax.

The third *Wolf* factor – whether the search and secondary proceeding were initiated by the same agency – again lands in the exclusion column. When proceedings are instituted by the same agency, the potential to ignore the Fourth Amendment is greater. *Wolf,* 13 F.3d at 195, quoting *Tirado, supra.* In this case, Detective Turner conducted the illegal search, notified a criminal investigator of the Department of Revenue about the dismissal of the criminal case, notified the Department that the prosecutor

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[1] In the proceedings below the State contended that this Court's ruling in *Hudson v. United States*, 522 U.S. 93 (1997) has called into question *Bryant, supra*, and by implication *Kurth Ranch, supra*. This is another compelling reason for this Court to accept jurisdiction of this case.

would be asking the Department to begin collection procedures, and attended the execution of the tax warrant and subsequent search of Adams' home. While not the same agency, it is tough to envision a closer connection or more symbiotic relationship.

Additionally, the CSET codifies a link between law enforcement and the tax collector. The statute – as amended in 1996 – mandates that the Department not commence collection procedures unless notified in writing by the prosecuting attorney that he/she does not intend to pursue criminal charges related to the controlled substance.

As with factors one through three, the fourth *Wolf* factor – whether there is an explicit and demonstrable understanding between the two governmental agencies – again favors exclusion. The CSET offers a direct economic incentive to law enforcement officers who pursue CSET assessments. The statute provides that 30% of each assessment goes to the law enforcement agency responsible for the assessment. I.C. 6-7-3-16(b). Additionally, 10% of the CSET money collected each month goes to the law enforcement training board to train law enforcement personnel. I.C. 6-7-3-16(c).

Without the exclusionary rule Indiana police officers have a direct financial incentive in conducting illegal searches. Instead of being deterred from conduct violating the Fourth Amendment, they are actually rewarded for doing so. They can choose how to proceed, criminally or civilly. If the criminal case is somehow unsuccessful because of the illegal search, they can simply switch streams and take the money. Either way, the police always win.

Tirado noted that the exclusionary rule is most needed where the concerns of the officers are furthered by a successful seizure. As Justice Boehm wrote in dissent in the Indiana Supreme Court, "in this case the officers not only further their agency's mission; they gain a bounty from a CSET collection." *State v. Adams*, 762 N.E.2d at 736.[2]

Finally, the fifth *Wolf* factor – whether the secondary proceeding fell within the "zone of primary interest" of the officers that conducted the search – also falls into the exclusion column. As *Wolf* itself noted, "where the relationship between the objectives of the law enforcement agency to which the officer belongs and the secondary proceedings is close, an inference may be drawn that the officers had the use of the evidence in the subsequent proceedings in mind when they made the seizure." *Wolf*, 13 F.3d at 195. *Wolf* further noted that the zone of primary interest of a law enforcement officer is "the apprehension, incapacitation, punishment, and . . . rehabilitation of criminals, as well as the possible deterrence of future criminals through the imposition of criminal sanctions." *Id.* at 194.

By its very nature, the CSET applies only to criminal activity. Criminal prosecution and the CSET are two sides of the same coin. At their discretion, police officers decide which side they want to pursue. Thus, its enforcement falls within the zone of primary interest of a law enforcement officer. Further, a significant percentage of the money

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[2] It should also be noted that since the Department must rely upon notification from law enforcement agencies, an explicit and demonstrable understanding between the agencies must exist by any definition.

collected will go directly to the law enforcement agency employing the officer.

In short, all of the factors enumerated in *Wolf* favor applying the Fourth Amendment's exclusionary rule to Indiana's CSET. This decision is further supported by prior decisions of this Court applying criminal protections to quasi-criminal proceedings. See, *One 1958 Plymouth Sedan, supra* and *Austin, supra*. Those cases hold that constitutional protections are available to those facing punitive forfeiture proceedings. The CSET is so punitive that it cannot be assessed if there is a criminal prosecution because of the protections afforded by the Double Jeopardy clause. Further, at least one other State has come down on the opposite side of the coin from Indiana. *Vara, supra*.

This Court should accept this Petition for Writ of Certiorari to settle the question of whether the Fourth Amendment's exclusionary rule applies to punitive CSET assessments. Respectfully, petitioner would assert that he is entitled to those protections because of the punitive nature of Indiana's CSET. To conclude otherwise would allow a Trojan Horse behind the walls of the Fourth Amendment that would effectively eviscerate the exclusionary rule and leave it standing in name only.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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762 N.E.2d 728; 2002 Ind. LEXIS 122

STATE OF INDIANA, INDIANA DEPARTMENT OF REVENUE, Appellant (Respondent below), v. DANTE **ADAMS**, Appellee (Petitioner below).

Supreme Court No. 49S10-0011-TA-628

SUPREME COURT OF INDIANA

February 8, 2002, Decided

SUBSEQUENT HISTORY: Petition for Rehearing Denied June 7, 2002, Reported at: 2002 Ind. LEXIS 524.

PRIOR HISTORY: APPEAL FROM THE INDIANA TAX COURT. The Honorable Thomas G. Fisher, Judge. Cause NO. 49T10-9904-TA-24. *Adams v. Department of State Revenue*, 730 N.E.2d 840, 2000 Ind. Tax LEXIS 23 (Ind. Tax Ct. 2000)

DISPOSITION: Tax court decision reversed; remanded.

COUNSEL: ATTORNEYS FOR APPELLANT: Karen Freeman-Wilson, Attorney General of Indiana, David A. Arthur, Deputy Attorney General, Indianapolis, IN.

ATTORNEYS FOR APPELLEE: Robert W. Hammerle, Joseph M. Cleary, Hammerle Foster Allen & Long-Sharp, Indianapolis, IN.

JUDGES: SULLIVAN, Justice. SHEPARD, C.J., and RUCKER, J., concur. BOEHM, J. dissents with separate opinion in which DICKSON, J., concurs.

OPINION BY: SULLIVAN

ON PETITION FOR REVIEW

SULLIVAN, Justice.

This is the first of two cases we decide today involving Dante Adams's difficulties with state revenue and criminal authorities after cocaine was discovered first in his safe deposit box and later in his home. This case presents the question of whether the cocaine found in an unconstitutional search of the safe deposit box by criminal authorities can be used by revenue authorities to make a tax assessment. We conclude that although the exclusionary rule bars the use of the cocaine as evidence in criminal proceedings, the exclusionary rule does not apply to tax assessment proceedings.

Background

On August 7, 1997, employees of an Indianapolis bank informed a police officer that an odor of marijuana emanated from a safe deposit box leased to Defendant Dante Adams. The officer obtained a search warrant based on this tip. The police then searched the safe deposit box and found cocaine. Defendant was charged with Dealing in Cocaine and Possession of Cocaine. Defendant then filed a motion to suppress the cocaine, arguing that the information on which the warrant was based was stale. At a suppression hearing, the officer testified that the informants had waited weeks to tell the police about the smell. The trial court concluded that the information in the warrant was stale and granted the motion to suppress on March 18, 1998. The State voluntarily withdrew the charges against Defendant on March 24.

On March 23 – a day before the criminal charges were dropped – the Indiana Department of Revenue ("the

Department") issued an assessment pursuant to the Controlled Substance Excise Tax ("CSET")[1] against Defendant. Adams sought to have the cocaine suppressed in the CSET proceedings. The Department declined, but the Tax Court reversed and held that the exclusionary rule applied to CSET assessments. It therefore ordered the cocaine to be suppressed and vacated the CSET assessment. *See Adams v. Dep't of Revenue,* 730 N.E.2d 840, 843-44 (Ind. Tax Ct. 2000). We granted review and now reverse the Tax Court.

Discussion

Both parties concede that the search of the safe deposit box violated Adams's federal constitutional right to be free from unreasonable searches and seizures. Adams contends that the State could not assess the CSET because the cocaine on which the assessment was based was discovered during an illegal search. We therefore must determine whether the cocaine should be suppressed in the CSET proceedings under the federal exclusionary rule.

In a companion case today,[2] we conclude that a later, separate search of Adams's home was unconstitutional. For purposes of a criminal case, this conclusion ends the inquiry, as illegally obtained evidence may not be used in criminal proceedings. *See Mapp v. Ohio,* 367 U.S. 643,

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[1] Ind. Code § 6-7-3-13 (1998). The CSET is a tax on the possession of certain narcotics. We discuss the tax and the procedures for collecting it in greater detail infra.

[2] *Adams v. State,* 762 N.E.2d 737, 2002 Ind. LEXIS 123 (Ind., 2002).

6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961). However, "[t]he fact that evidence was seized in violation of the Fourth Amendment does not mean that it will be suppressed for every purpose in every proceeding." *Tirado v. Comm'r of Internal Revenue,* 689 F.2d 307, 310 (2d Cir. 1982), cert. denied, 460 U.S. 1014 (1983). In this case, we must determine whether the fruits of a different search – that of the safe deposit box – should have been excluded in the tax collection proceedings. We are operating not only in a different context (tax versus criminal) but are analyzing different searches (the search of the safe deposit box versus the search of Adams's home). Therefore, our conclusion in the companion case that the State could not introduce in a criminal proceeding evidence obtained from an illegal search of Adams's home does not affect our analysis in this case as to whether the illegal search of the safe deposit box should lead to exclusion of evidence in the CSET proceeding.

The United States Supreme Court has held that the exclusionary rule is not constitutionally mandated, but is "a judicially created means of deterring illegal searches and seizures." *Pennsylvania Bd. of Probation & Parole v. Scott,* 524 U.S. 357, 363, 141 L. Ed. 2d 344, 118 S. Ct. 2014 (1998). *See also Elkins v. United States,* 364 U.S. 206, 217, 4 L. Ed. 2d 1669, 80 S. Ct. 1437 (1960) ("The rule is calculated to prevent, not to repair. Its purpose is to deter . . . by removing the incentive to disregard it.").[3] Because the

[3] Adams does not argue that the Indiana Constitution mandates an exclusionary rule that is distinct from that imposed under federal case law. Therefore we need not address whether values other than deterrence might motivate the suppression of evidence under an *Indiana* exclusionary rule.

exclusionary rule is a judicially-created prophylactic device, the rule applies only "to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra,* 414 U.S. 338, 348, 38 L. Ed. 2d 561, 94 S. Ct. 613 (1973). The Court has concluded that the rule is most effective when "its deterrence benefits outweigh its 'substantial social costs.'" *Scott,* 524 U.S. at 363 (quoting *United States v. Leon,* 468 U.S. 897, 907, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984)). *See also I.N.S. v. Lopez-Mendoza,* 468 U.S. 1032, 82 L. Ed. 2d 778, 104 S. Ct. 3479 (1984); *United States v. Janis,* 428 U.S. 433, 49 L. Ed. 2d 1046, 96 S. Ct. 3021 (1976).

Our analysis of both the deterrence produced and the costs incurred in the context of CSET assessments leads us to conclude that the exclusionary rule should not apply.

As the facts of this case show, both police and revenue officers are involved in enforcing the CSET: Police investigations uncover illegal narcotics, while the Department's revenue officers must collect CSET assessments on those narcotics. We do not believe that applying the exclusionary rule in CSET assessment proceedings will serve to deter either police or revenue officers from making illegal searches or seizures.

The police will not be significantly deterred by the prospect of the exclusion of evidence in CSET proceedings because their primary concern is criminal prosecutions, where the exclusionary rule already applies. "Where evidence is obtained in an allegedly illegal search in furtherance of a criminal investigation, it is generally unlikely that application of the exclusionary rule to bar the evidence in a secondary civil proceeding will deter future Fourth Amendment violations." *Wolf v. Comm'r of*

Internal Revenue, 13 F.3d 189, 194 (6th Cir. 1993) (declining to apply the exclusionary rule to tax collection proceedings after evidence was illegally seized in narcotics investigation). The Supreme Court has concluded that government agents will be deterred when the conduct at issue falls "within the offending officer's zone of primary interest." *Janis,* 428 U.S. at 458. *See also Scott,* 524 U.S. at 364. The police's primary concern is the enforcement of the State's criminal laws, not its tax code.[4] The CSET is simply not so interrelated with "the often competitive enterprise of ferreting out crime" to warrant an extension of the exclusionary rule. *United States v. Leon,* 468 U.S. 897, 978, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984).

We acknowledge some deterrence of revenue officers if the exclusionary rule is applied to CSET proceedings but we think these circumstances will be infrequent. In the

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[4] As the Sixth Circuit put it in *Wolf:*

> The primary interest of law enforcement agents is the apprehension, incapacitation, punishment, and (formerly, at least) rehabilitation of criminals, as well as the possible deterrence of future criminals through the imposition of criminal sanctions. . . . By contrast, such an agent may have little interest in subsequent civil proceedings. Where civil proceedings are brought, for example, to tax ill-gotten gains, such proceedings do little more than subject criminals to the same taxes that govern all citizens. Excluding illegally seized evidence from proceedings to enforce tax and regulatory regimes is unlikely to deter law enforcement officials from violating a suspect's Fourth Amendment rights.

Wolf, 13 F.3d at 194 (footnote omitted). The facts of this case support this analysis, as the officers found the drugs in August of 1997 (R. at 140) but the Department did not issue a CSET assessment until March of 1998, when the evidence was suppressed in the criminal proceedings.

companion case, we hold that CSET levies will generally be reasonable for Fourth Amendment purposes. *Adams v. State,* 762 N.E.2d 743, 2002 Ind. LEXIS 123 at *9. The companion case invalidates searches by revenue officers only where the officers rely solely on a jeopardy warrant issued under Indiana Code § 6-7-3-13's provisions that allow the Department to issue jeopardy warrants without any standards or showing of exigency. *Id.* However, most jeopardy warrants are not issued under that code section. Instead, they are issued under Ind. Code § 6-8.1-5-3. *Id.* As such, the Department will be able to issue jeopardy warrants and levy on CSET assessments in most circumstances without violating the Fourth Amendment. Because levies by the Department will only violate the Fourth Amendment in certain narrow circumstances, application of the rule will not produce any significant deterrence to unlawful conduct by revenue officers.

As to the costs, we believe that application of the exclusionary rule in CSET proceedings will serve to undermine several important State interests. First, application of the exclusionary rule will frustrate the State's ability to exercise its power to tax, which is a "power of the highest essential order." *Bryant v. State,* 660 N.E.2d 290, 310 (Ind. 1995) (DeBruler, J., concurring in part and dissenting in part). This power undergirds all other governmental activity and without it the State could not function. Application of the exclusionary rule would inevitably enable some taxpayers to avoid paying their taxes: "Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: It undeniably detracts from the truthfinding process and allows many . . . to escape the consequences of their actions." *Scott,* 524 U.S. at 364. This cost of lost evidence is

even greater in CSET assessments than it is in criminal cases. If we were to suppress the drugs at issue in CSET proceedings, the tax cannot be assessed. Conversely, the prosecution of a criminal can often continue despite the suppression of evidence because the State will have other evidence on which it can obtain a conviction.

Second, we note that the Supreme Court cited the cost of lost evidence when it refused to apply the exclusionary rule to federal tax proceedings. *See United States v. Janis,* 428 U.S. 433, 49 L. Ed. 2d 1046, 96 S. Ct. 3021 (1976). In *Janis,* state law enforcement officers conducted an illegal search and the IRS attempted to introduce evidence stemming from the search in federal civil tax proceedings. Even though the Court relied heavily on this inter-sovereign aspect of the case, it also concluded that the costs of exclusion would be high because "the enforcement of admittedly valid laws would be hampered by so extending the exclusionary rule, and, as is nearly always the case with the rule, concededly relevant and reliable evidence would be rendered unavailable." *Id.* at 447.

Third, the Supreme Court has often analyzed the cost of the exclusionary rule in terms of the toll it could take on the proceedings in which it is invoked. *See Scott,* 524 U.S. at 364. ("Application of the exclusionary rule would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings."); *Lopez-Mendoza,* 468 U.S. at 1048 (refusing to apply exclusionary rule to deportation proceedings in part because "the prospect of even occasional invocation of the exclusionary rule might significantly change and complicate the [informal] character of proceedings."). The Department collects the CSET in an administrative manner similar to the parole revocation

hearings in *Scott* or the immigration proceedings in *Lopez-Mendoza. See* Ind. Code § 6-7-3-13. As in those contexts, incorporation of the exclusionary rule would require complicated legal determinations that would frustrate the purpose of such expedited proceedings.

Our conclusion is consistent with those reached by most of the courts that have addressed this issue. *See Wolf v. Comm'r of Internal Revenue,* 13 F.3d 189, 194 (6th Cir. 1993); *Tirado v. Comm'r of Internal Revenue,* 689 F.2d 307, 314 (2d Cir. 1982); *Kivela v. Dep't. of Treasury,* 449 Mich. 220, 536 N.W.2d 498 (1995). *But cf. Vara v. Sharp,* 880 S.W.2d 844 (Tex. App. 1994). The Supreme Court has applied the rule in only one context outside of its general use in criminal trials. In *One 1958 Plymouth Sedan v. Pennsylvania,* the Court concluded that the exclusionary rule applied to civil forfeiture proceedings because such proceedings are "quasi-criminal" in nature. 380 U.S. 693, 700, 14 L. Ed. 2d 170, 85 S. Ct. 1246 (1965). While the CSET has some quasi-criminal aspects in that it taxes narcotics, it is not quasi-criminal in the same sense as civil forfeiture because it does not stem from the State's regulatory power, which is typically more coercive than the State's power to tax. That is to say, because the CSET is part of the State's power of the purse, not its power of the sword, it is less punitive than civil forfeiture and *One 1958 Plymouth Sedan*'s reasoning does not necessarily apply.

In reaching its conclusion that the exclusionary rule applies to the CSET, the Court of Appeals expressed concerns that

> If there were no Fourth Amendment protections when evidence was illegally obtained, the State would have the opportunity to take a second bite

> at the same apple: assuming evidence was illegally obtained and a criminal prosecution could not result, then IDR could still assess the CSET on all evidence that was illegally obtained. There must be some protection against this practice.

Adams v. State, 726 N.E.2d 390, 395 (Ind. Ct. App. 2000).

Of course, this practice is possible in any of the civil contexts in which the United States Supreme Court has refused to apply the rule. *Pennsylvania Bd. of Probation & Parole v. Scott,* 524 U.S. 357, 141 L. Ed. 2d 344, 118 S. Ct. 2014 (1998) (allowing introduction of illegally obtained evidence at parole hearings), *I.N.S. v. Lopez-Mendoza,* 468 U.S. 1032, 82 L. Ed. 2d 778, 104 S. Ct. 3479 (1984) (deportation hearings); *United States v. Janis,* 428 U.S. 433, 49 L. Ed. 2d 1046, 96 S. Ct. 3021 (1975) (tax hearings); *United States v. Calandra,* 414 U.S. 338, 38 L. Ed. 2d 561 94 S. Ct. 613 (1973) (grand jury investigations). Moreover, the exclusionary rule will apply if police collude with revenue officials to subvert a taxpayer's Fourth Amendment rights. *See Kivela v. Dep't. of Treasury,* 449 Mich. 220, 226, 536 N.W.2d 498, 500 (1995). ("Unless there is collusion between the agency that performed the illegal search and the agency seeking to admit the incriminating evidence, the evidence is admissible."). There is no evidence in the record that suggests that revenue officers were involved in the search of Adam's safe deposit box, which is the only search at issue here.

Because we conclude that the costs of applying the exclusionary rule to the CSET outweigh its limited benefits in this context, we decline to apply the rule to the evidence seized from Adams's safe deposit box.

Conclusion

We reverse the Tax Court and remand for proceedings consistent with this opinion.

SHEPARD, C.J., and RUCKER, J., concur.

BOEHM, J. dissents with separate opinion in which DICKSON, J., concurs.

DISSENT BY: BOEHM

DISSENT:

BOEHM, Justice, dissenting.

I respectfully dissent. The issue is whether the Fourth Amendment requires that evidence that was admittedly seized in violation of the Fourth Amendment and is inadmissible in a criminal prosecution must also be excluded in proceedings to assess Indiana's Controlled Substance Excise Tax (CSET).[1] Because the purpose of the exclusionary rule is to remove the incentive for unreasonable governmental invasions of citizens' privacy, the closer the responsibilities of the seizing authority are to the subject matter of the civil proceeding, the more persuasive the case for exclusion of unconstitutionally seized evidence. Here the seizing agency was the county sheriff's department and the civil proceeding was an assessment of a tax that is essentially punitive and whose collection augments local law enforcement funding. Under these circumstances, I believe both precedent and principle

[1] As the majority correctly notes, Adams does not argue that the search and seizure provision of the Indiana Constitution requires a different result. That issue is not before us.

dictate that the Fourth Amendment precludes admission of the evidence in this case.

The Fourth Amendment to the United States Constitution preserves the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In *Weeks v. United States,* 232 U.S. 383, 398, 58 L. Ed. 652, 34 S. Ct. 341 (1914), the United States Supreme Court held that evidence seized in violation of the Fourth Amendment is not admissible in a federal criminal proceeding. In *Mapp v. Ohio,* 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961), the Supreme Court made clear the same is true in state criminal proceedings. The Court has repeatedly explained that the rule protects all citizens by removing the incentive to conduct an unreasonable search. *Id.* at 656. It does so at the cost of excluding otherwise highly relevant evidence if the search, though unlawful, nonetheless bears fruit. That cost is the price our Constitution willingly accepts in the interest of preserving the rights of all to be free from unreasonable governmental intrusions.

In *United States v. Janis,* 428 U.S. 433, 49 L. Ed. 2d 1046, 96 S. Ct. 3021 (1976), the Supreme Court considered the extent to which the exclusionary rule applies in civil proceedings. *Janis* dealt with evidence unlawfully seized by state officers. In a 5-3 decision, with Justice Stevens not participating, the Supreme Court allowed the admission of that evidence in a federal gambling excise tax proceeding. *Id.* at 459-60. The Court once again balanced the likely social benefits of applying the rule against the costs of excluding the evidence. *Id.* 428 U.S. at 453-54. Although *Elkins v. United States,* 364 U.S. 206, 223, 4 L. Ed. 2d 1669, 80 S. Ct. 1437, (1960) had made clear that

evidence unlawfully seized by state officials cannot be admitted in federal criminal prosecutions, the majority concluded that state criminal law enforcement officers would not be significantly deterred by a rule that excluded the evidence from federal tax proceedings. *Janis,* 428 U.S. at 459. The decision pointed out that earlier cases applying the exclusionary rule in civil proceedings had involved "intrasovereign" violations. 428 U.S. 456.[2]

Lower federal courts have since elaborated on the *Janis* balancing test. In *Tirado v. C.I.R.,* 689 F.2d 307, 310 (2nd Cir. 1982), the Second Circuit concluded that "[d]etermining when the likelihood of substantial deterrence justifies excluding evidence requires some assessment of the motives of the officials who seized the challenged evidence." The court also observed that "the key issue, implicit in *Janis* as in other exclusionary rule decisions, is still what concerns the seizing officers had in mind." *Id.* at 313. Elaborating on this theme, the Sixth Circuit, in *Wolf v. C.I.R.,* 13 F.3d 189, 194-95 (6th Cir. 1993), set forth five factors relevant to the application of the exclusionary rule in a civil proceeding: (1) the

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[2] *See, e.g., Pizzarello v. United States,* 408 F.2d 579, 586 (2nd Cir. 1969) (evidence unlawfully seized by federal Treasury agents inadmissible in federal wagering excise tax assessment); *United States v. Blank,* 261 F. Supp. 180, 184 (N.D. Ohio 1966) (evidence unlawfully seized by IRS agents inadmissible in federal wagering excise tax assessment); *Powell v. Zuckert,* 125 U.S. App. D.C. 55, 366 F.2d 634, 640 (D.C. Cir. 1966) (evidence unlawfully seized by Air Force special agents inadmissible in civilian employee discharge proceeding); *State of Iowa v. Union Asphalt & Roadoils, Inc.,* 281 F. Supp. 391, 407 (S.D. Iowa 1968) (evidence unlawfully seized by agents of the Iowa Attorney General cannot be offered into evidence by the State as plaintiff in a civil action under the antitrust laws).

nature of the proceeding; (2) whether the proposed use of unconstitutionally seized material is intersovereign or intrasovereign; (3) whether the search and secondary proceeding were initiated by the same agency; (4) whether there is an explicit and demonstrable understanding between the two governmental agencies; and (5) whether the secondary proceeding fell within the "zone of primary interest" of the officers that conducted the search.

The first factor, the nature of the civil proceeding, is clearly significant and points strongly toward requiring exclusion in this case. This Court recently examined the CSET assessment process in *Bryant v. State,* 660 N.E.2d 290, 297 (Ind. 1995), and concluded "the CSET is so far removed from a normal excise tax that it must be classified as a punishment." The Court noted the CSET's focus on deterrence, not revenue raising, as evidenced by the receipt to a CSET taxpayer that admonishes that the unauthorized delivery, sale, possession or manufacture of a controlled substance is a crime. *Id.* at 296. A possessor of contraband is required to show this receipt to prove the tax has been paid. *Id.* At the time *Bryant* was decided, the receipt was valid for only forty-eight hours, and a taxpayer who possessed the same drug for a longer period was required to repay the tax every forty-eight hours to avoid the CSET's additional sanctions. *Id.* In 1996, after the ruling in *Bryant,* the General Assembly extended the validity of the receipt from forty-eight hours to thirty days. Ind. Code § 6-7-3-10(b) (1998). Despite this change, I think it obvious that the tax remains, at heart, punitive in nature. I acknowledge that the federal wagering tax involved in *Janis* has some of these characteristics, but it is nowhere near the CSET in overall draconian impact.

Bryant also pointed out that the fact the CSET applied only if a crime had been committed suggested the CSET's punitive nature. 660 N.E.2d at 296. The 1996 CSET amendments did nothing to alter this, and now, as then, the tax is imposed only on individuals who deliver, possess or manufacture controlled substances in violation of Indiana or federal drug laws. 660 N.E. 2d at 296-97. In contrast, in both *Tirado,* 689 F.2d at 309, and in *Wolf,* 13 F.3d at 191, two of the principal cases upon which the majority relies, the civil proceedings were for assessment and collection of federal income taxes which apply to all human activity and are plainly revenue measures, not surrogate punishments.

Finally, *Bryant* noted that an excise tax is imposed upon the performance of an act or the enjoyment of a privilege, but the CSET is imposed only after a taxpayer's drugs have been confiscated, and the taxpayer neither enjoys a privilege nor performs an act at the time of taxation. 660 N.E.2d at 297. That observation remains true after the 1996 amendments. The State contends that the United States Supreme Court's subsequent ruling in *Hudson v. United States,* 522 U.S. 93, 139 L. Ed. 2d 450, 118 S. Ct. 488 (1997), has called into question this Court's holding in *Bryant* that double jeopardy precluded imposition of the tax and criminal prosecution for the same drug possession. Even if this is the case, I nevertheless believe *Bryant* was plainly correct in its view that the civil sanctions imposed pursuant to the CSET are punitive in nature.

The second *Wolf* factor is the one *Janis* emphasized in finding evidence seized by state officers to be admissible in a federal tax proceeding: whether the evidence is to be used in a proceeding under the same government whose

agents seized it. Here, of course, both the taxing authorities and the law enforcement officers operated as agents of the State of Indiana.

The third, fourth, and fifth *Wolf* factors are closely related. The third factor is whether the search and the civil proceeding were initiated by the same agency. If so, the potential incentive to ignore the Fourth Amendment is greater. As *Wolf* put it, quoting *Tirado:* "'Agents are likely to have all the responsibilities of their agency in mind as they go about their investigations.'" 13 F.3d at 195. Although the sheriff and the initiator of the CSET proceeding are not literally the same agency, they plainly operated in concert. Detective Michael Turner of the Marion County Sheriff's Department conducted the initial illegal search, notified the Department of Revenue that the criminal case was being dismissed, informed the Department that the prosecuting attorney would be asking the Department to begin collection proceedings, and attended the execution of the tax warrant and the search of Adams' home. Indeed, the link between law enforcement and tax collection is embedded in the statute. The 1996 amendments to the CSET mandate the Department may not commence collection proceedings unless the Department either is ordered to do so in a court's sentencing order, or is notified in writing by the prosecuting attorney of the jurisdiction where the offense occurred that the prosecuting attorney does not intend to pursue criminal charges related to the controlled substance. I.C. § 6-7-3-19.

This brings us to the fourth *Wolf* factor: whether, if two agencies are involved, there is an explicit and demonstrable understanding between the two. It seems obvious that if the Department must rely upon notification from law enforcement agencies before it may commence collec-

tion proceedings, an explicit and demonstrable understanding between the agencies must exist. In any event, the *Wolf* court explained that in determining whether there is such an understanding between the two governmental agencies, a court may consider the existence of a statutory regime "in which both agencies share resources – particularly resources derived from one of the proceedings." 13 F.3d at 195. The CSET provides for a sharing of resources in the most direct form: it offers a direct economic incentive to law enforcement officers who pursue CSET assessments. The act provides that thirty percent of each assessment is to go to the law enforcement agency that is responsible for the information leading to the assessment, to be used "to conduct criminal investigations." I.C. § 6-7-3-16(b). Similarly, ten percent of CSET money collected each month is awarded to the law enforcement training board to train law enforcement personnel. *Id.* § 6-7-3-16(c). As *Tirado* observed, the exclusionary rule is most needed where the concerns of the securing officers are furthered by a successful seizure. In this case the officers not only further their agency's mission; they gain a bounty from a CSET collection.

The fifth *Wolf* factor is whether the secondary proceeding fell within the "zone of primary interest" of the officers that conducted the search. As the court explained, "Where the relationship between the objectives of the law enforcement agency to which the officer belongs and the secondary proceedings is close, an inference may be drawn that the officers had the use of the evidence in the subsequent proceeding in mind when they made the seizure." *Wolf,* 13 F.3d at 195. The zone of primary interest of a law enforcement officer is "the apprehension, incapacitation, punishment, and . . . rehabilitation of criminals, as well as

the possible deterrence of future criminals through the imposition of criminal sanctions." 13 F.3d at 194. Because the CSET applies only to criminal activity, its enforcement quite properly falls within the zone of primary interest of a law enforcement officer. Indeed, the funds collected will directly bolster the budget, and presumably the crime-fighting ability, of the officer's law enforcement agency. The Willie Sutton principle applies here – the collection of the tax is where the money is.

In sum, it seems to me that these general principles all cut in the direction of application of the exclusionary rule. In addition, other courts have found the Fourth Amendment to require exclusion in the specific context of controlled substance tax cases. In *Vara v. Sharp,* 880 S.W.2d 844 (Tex. App. 1994), the Court of Appeals of Texas applied the *Wolf* factors to the Texas Controlled Substances Tax Act, which is very similar to Indiana's CSET. The court concluded the federal exclusionary rule applied, and the provision of the Texas statute that prohibited application of the exclusionary rule violated the United States Constitution. 880 S.W.2d at 852. The *Vara* court pointed out that the exclusionary rule has been applied in civil forfeiture proceedings because of their quasi-criminal nature. *Id.* at 851 (citing *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 14 L. Ed. 2d 170, 85 S. Ct. 1246 (1965)). The court also noted the United States Supreme Court has held that certain constitutional protections normally reserved for criminal proceedings apply to civil proceedings of a quasi-criminal nature. *Id.* (citing *Austin v. United States,* 509 U.S. 602, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (1993)). In *Austin,* the Supreme Court held that forfeiture proceedings "historically have been understood, at least in part, as punishment," and were

therefore subject to the limitations of the Eighth Amendment's excessive fines clause. 509 U.S. at 618. Under this line of cases, the more punitive the proceeding, the greater the constitutional protections afforded and the more persuasive the argument for application of the exclusionary rule.

For all of these reasons, I believe the Fourth Amendment interest in deterring illegal searches and seizures outweighs the costs of excluding illegally obtained evidence in a CSET proceeding. The cost of application of the exclusionary rule in tax collection proceedings is merely to impair the State's ability to collect this fine clothed as a tax. It may be something of an overstatement to say, as the Court of Appeals did in Adams' criminal case, that if the exclusionary rule does not apply to CSET proceedings, there is "absolutely no downside risk to officers illegally seizing drug evidence." *Adams v. State,* 726 N.E.2d 390, 395 (Ind. Ct. App. 2000). But it is not an overstatement to say that the incentive to search without a warrant is significant if very substantial financial penalties may be recovered for the seizing agency. That puts all citizens at risk of overzealous enforcement. The Fourth Amendment strikes that balance in favor of application of the exclusionary rule.

DICKSON, J., concurs.

730 N.E.2d 840; 2000 Ind. Tax LEXIS 23

DANTE **ADAMS**, Petitioner, v. DEPARTMENT OF STATE REVENUE, Respondent.

Cause No. 49T10-9904-TA-00024

INDIANA TAX COURT

June 5, 2000, Decided

PRIOR HISTORY: ON APPEAL FROM A FINAL DETERMINATION OF THE DEPARTMENT OF STATE REVENUE.

DISPOSITION: Court REVERSES Department's assessment determination in letter of findings that Adams owes CSET in amount stated. Court ORDERS Department to immediately refund to Adams such amounts, plus interest received, as have been applied to CSET assessment.

COUNSEL: FOR PETITIONERS: ROBERT W. HAMMERLE, JOSEPH M. CLEARY, HAMMERLE FOSTER ALLEN & LONG-SHARP, Indianapolis, IN.

FOR RESPONDENT: KAREN M. FREEMAN-WILSON, ATTORNEY GENERAL OF INDIANA, DAVID A. ARTHUR, DEPUTY ATTORNEY GENERAL, Indianapolis, IN.

JUDGES: FISHER, J.

OPINION BY: FISHER

FISHER, J.

The petitioner, Dante Adams (Adams), challenges the Department of State Revenue's (Department) finding that Adams owes controlled substance excise tax (CSET) in the amount of $159,096.00. Adams raises several issues for

this Court's review; however, because one of the issues is dispositive, the Court addresses only that issue: whether the exclusionary rule of evidence applies to this proceeding, thereby making the CSET assessment invalid.

FACTS and PROCEDURAL HISTORY

The facts of this case are undisputed. On March 23, 1998, the Department issued a Jeopardy Tax Assessment,[1] which includes interest and a penalty, against Adams totaling nearly $160,000. An agent for the Department who, in this instance, acted as a criminal investigator with the Department prepared and issued the assessment notice. (Joint Ex. A.) The assessment was based upon cocaine possessed by Adams discovered in a safe deposit box on or about August 8, 1997. (Pet'r Br. at 2.) Prior to this assessment, on August 13, 1997, Adams was charged in Marion County Superior Court, Criminal Division, with Dealing in Cocaine, a class A felony,[2] as well as for Possession of Cocaine, which is a class C felony.[3]

In that criminal case, Adams, arguing that the search was unconstitutional, filed a motion to suppress evidence. On March 16, 1998, the Honorable Judge Magnus-Stinson ruled that the State had violated Adams' rights under both the state and federal constitutions when it seized the cocaine. (Joint Ex. 6.) Judge Magnus-Stinson also found that the affiant for the search warrant misrepresented

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[1] *See* IND. CODE ANN. § 6-7-3-13 (West 2000).

[2] *See* IND. CODE ANN. § 35-48-4-1(b) (West 1998).

[3] *See* IND. CODE ANN. § 35-48-4-1(b)(1) (West 1998 & Supp. 1999).

facts and did not act in good faith. (*Id.*) As such, the trial court found that the search and seizure of the cocaine discovered in Adams' safe-deposit box was unconstitutional. On March 24, 1998, one day *after* the Jeopardy Tax Assessment was prepared, the State moved to dismiss the criminal charges against Adams as a result of the ruling to suppress the evidence. That same day, the lower court granted the motion. On March 26, 1998, the Marion County Prosecutor sent written notification to the Department that all attempts to criminally prosecute Adams with respect to the cocaine in question would no longer take place due to the unconstitutionality of the search and seizure of the cocaine. This occurred *three days after* the jeopardy tax assessment was prepared against Adams.[4] The assessment was served upon Adams by mail on March 31, 1998.

On April 9, 1998, Adams timely filed a protest letter with the Department contesting the CSET. On April 13, 1998, agents from the Department and the Marion County Sheriff's civil office executed a tax warrant on Adams' apartment. Adams' personal belongings were seized and subsequently sold.[5]

A hearing was held on July 14, 1998. On October 9, 1998, the Department issued its letter of findings, which denied Adams' protest. Unsatisfied with the Department's findings, Adams filed this original tax appeal. On October

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[4] The Jeopardy Tax Assessment included a 100% penalty.

[5] According to the Department, approximately $28,300.01 was collected from Adams, which was applied against the tax liability. (Resp't Br. at 3 & Joint Ex. 17.)

25, 1999, this Court held a trial in this matter. Additional facts will be supplied as necessary.

ANALYSIS AND OPINION

Standard of Review

This court reviews final determinations of the Department de novo and is bound neither by the evidence nor the issues raised at the administrative level. *See* IND. CODE ANN. § 6-8.1-5-1(h) (West 2000); *see also Hurst v. Dep't of State Revenue,* 721 N.E.2d 370, 372 (Ind. Tax Ct. 1999); *Tri States Double Cola Bottling Co. v. Dep't of State Revenue,* 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999).

Discussion

Application of the Exclusionary Rule to CSET Cases

Adams argues that because the CSET is quasi-criminal in nature, "those that are subjected to it must receive the full panoply of state and federal constitutional rights afforded those facing criminal prosecution." (Pet'r Br. at 4.) Conversely, the Department argues that the Fourth Amendment does not apply and should not be extended to CSET cases.

Recently, in *Hurst v. Department of State Revenue,* 721 N.E.2d 370, 373 (Ind, Tax Ct. 1999), this Court articulated that the CSET is imposed by statute on the illegal possession of specific categorized controlled substances. IND. CODE ANN. § 6-7-3-5 (West 2000) reads:

> The controlled substance excise tax is imposed on controlled substances that are:
>
> (1) delivered;

(2) possessed; or

(3) manufactured;

in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852. The tax does not apply to a controlled substance that is distributed, manufactured, or dispensed by a person registered under IC 35-48-3.

Thus, as is made clear by the controlling statute, to be liable[6] a taxpayer is required to manufacture, possess, or deliver a controlled substance.[7] In the case at bar, the Department argues that Adams was in possession of 1988.7 grams of cocaine. (Joint Ex. 7.)

The Indiana Court of Appeals dealt with the same individual, same search and same cocaine in *Adams v. State,* 726 N.E.2d 390 (Ind. Ct. App. 2000), *petition for reh'g denied* June 1, 2000. In that case, Adams, as a criminal defendant, was charged with possession of and dealing in cocaine. The cocaine with which Adams was charged with possession and dealing was discovered in Adams' house via a tax warrant that was issued as a result of the CSET assessment that was based on the cocaine discovered in Adams' safe deposit box, which was suppressed on March 16, 1998.

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[6] Again, as was stated in *Hurst, ownership* of a controlled substance is not a triggering event for purposes of assessing CSET. *See Hurst,* 721 N.E.2d at 373 n.11; *see also Bailey v. Department of State Revenue,* 660 N.E.2d 322, 324 (Ind. 1995). Instead, the triggering events are the manufacturing, possession, or delivery of a controlled substance. *See Bailey,* 660 N.E.2d at 324.

[7] *See* IND. CODE § 35-48-1-9 (1998) for definitions and guidance to the various classifications of controlled substances.

After being criminally charged for possession and dealing of cocaine, Adams filed a Motion to Suppress arguing that the cocaine found in his house on April 13, 1998, was fruit of the poisonous tree. The trial court denied that Motion and Adams filed an interlocutory appeal, which was granted. The Court of Appeals reversed the decision of the lower court and held that "Fourth Amendment protections, *specifically,* the exclusionary rule apply to the CSET when a tax warrant has been based on *judicially determined illegally seized evidence.*" *Id.* at 395 (emphasis added); *see also Germaine v. State,* 718 N.E.2d 1125, 1130 (Ind. Ct. App. 1999) (stating that the Fourth Amendment is to safeguard the privacy and security of individuals against governmental officials and that a warrant is required during civil as well as criminal investigations). The Court of Appeals also disqualified the seizure of the cocaine found in his house based on the fruit of the poisonous tree doctrine.[8] This Court agrees with the Court of Appeals' decision that extends the exclusionary rule[9] to Indiana's CSET when it is clearly based on judicially determined illegally seized evidence. The seizure of the cocaine for which the Department based its CSET was suppressed and is not subject to the CSET. *But for* the

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[8] The fruit of the poisonous tree doctrine refers to evidence that is spawned by or directly derived from an illegal search. It is generally inadmissible because of its original taint, though knowledge of facts gained independently of the original and tainted search is admissible. *See* BLACK'S LAW DICTIONARY 462 (abr. 6th ed. 1991).

[9] The exclusionary rule commands that where evidence has been obtained in violation of the search and seizure protections guaranteed by the Fourth Amendment, the illegally obtained evidence cannot be used at the trial of the defendant. *See* BLACK'S LAW DICTIONARY 391 (abr. 6th ed. 1991).

illegal conduct, the cocaine would not have been discovered and not subject to the CSET. *See Adams*, 726 N.E.2d at 393. Because the parties presented similar arguments in the case before the Court of Appeals, this Court believes it to be unnecessary to rehash the same arguments. The Court adopts and incorporates the analysis of the Court of Appeals in *Adams v. State*.

CONCLUSION

Based on the foregoing, this Court REVERSES the Department's assessment determination in the letter of findings that Adams owes CSET in the amount stated above. As such, the Court ORDERS the Department to immediately refund to Adams such amounts, plus interest received, as have been applied to the CSET assessment.

2002 Ind. LEXIS 524

Indiana Dept. of Revenue v. Dante **Adams**

49S10-0011-TA-628

SUPREME COURT OF INDIANA

June 7, 2002, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Original Opinion of February 8, 2002, Reported at: 2002 Ind. LEXIS 122, *State v. Adams,* 762 N.E.2d 728, 2002 Ind. LEXIS 122 (Ind. 2002).

OPINION: Rehearing Denied.

IC 6-7-3

Chapter 3. Controlled Substance Excise Tax

IC 6-7-3-1

Sec. 1. As used in this chapter, "controlled substance" has the meaning set forth in IC 35-48-1-9.

As added by P.L. 50-1992, SEC. 1.

IC 6-7-3-2

Sec. 2. As used in this chapter, "delivery" has the meaning set forth in IC 35-48-1-11.

As added by P.L. 50-1992, SEC. 1.

IC 6-7-3-3

Sec. 3. As used in this chapter, "department" refers to the department of state revenue.

As added by P.L. 50-1992, SEC. 1.

IC 6-7-3-4

Sec. 4. As used in this chapter, "manufacture" has the meaning set forth in IC 35-48-1-18.

As added by P.L. 50-1992, SEC. 1.

IC 6-7-3-4.1

Sec. 4.1. As used in this chapter, "marijuana" has the meaning set forth in IC 35-48-1-19.

As added by P.L. 65-1996, SEC. 1.

IC 6-7-3-5

Sec. 5. The controlled substance excise tax is imposed on controlled substances that are:

(1) delivered;

(2) possessed; or

(3) manufactured;

in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852. The tax does not apply to a controlled substance that is distributed, manufactured, or dispensed by a person registered under IC 35-48-3.

As added by P.L. 50-1992, SEC. 1.

IC 6-7-3-6.

Sec. 6. (a) The amount of the controlled substance excise tax is determined by:

(1) the weight of the controlled substance; or

(2) the pill, capsule, hit, rock, or dosage when a controlled substance is delivered, possessed, or manufactured in that form.

(b) The amount of controlled substance excise tax is as follows:

(1) On each gram of a schedule I, II, or III controlled substance, except marijuana, forty dollars ($40) for each gram and a proportionate amount for each fraction of a gram.

(2) On each gram of marijuana, three dollars and fifty cents ($3.50) for each gram and a proportionate amount for each fraction of a gram.

(3) On each pill, capsule, hit, rock, or dosage of a schedule I, II, or III controlled substance, forty dollars ($40).

(4) On each gram of a schedule IV controlled substance, twenty dollars ($20) for each gram and a proportionate amount for each fraction of a gram.

(5) On each pill, capsule, hit, rock, or dosage of a schedule IV controlled substance, twenty dollars ($20).

(6) On each gram of a schedule V controlled substance, ten dollars ($10) for each gram and a proportionate amount for each fraction of a gram.

(7) On each pill, capsule, hit, rock, or dosage of a schedule V controlled substance, ten dollars ($10).

(c) A gram of a controlled substance is measured by the weight of the substance in possession whether pure, impure, or diluted. A quantity of a controlled substance is diluted if the substance consists of a detectable quantity of pure controlled substance and any excipient, fillers, or waste.

As added by P.L. 50-1992, SEC. 1. Amended by P.L. 65-1996, SEC. 2.

IC 6-7-3-7

Sec. 7. A person who delivers a controlled substance to a law enforcement officer is not relieved of the duty to pay taxes under this chapter.

As added by P.L. 50-1992, SEC. 1.

IC 6-7-3-8

Sec. 8. The tax imposed under this chapter is due when the person receives delivery of, takes possession of, or manufactures a controlled substance in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852. A person may not be required to reveal the person's identity at the time the tax is paid.

As added by P.L. 50-1992, SEC. 1.

IC 6-7-3-9

Sec. 9. The payment of the tax under this chapter does not make the buyer immune from criminal prosecution. However, confidential information acquired by the department may not be used to initiate or facilitate prosecution for an offense other than an offense based on a violation of this chapter.

As added by P.L. 50-1992, SEC. 1.

IC 6-7-3-10

Sec. 10. (a) The department shall issue evidence of payment of the tax to the person paying the tax. The evidence of payment must include a statement stating the following:

> "THIS EVIDENCE OF PAYMENT DOES NOT LEGALIZE THE DELIVERY, SALE, POSSESSION, OR MANUFACTURE OF A CONTROLLED SUBSTANCE. THE UNAUTHOR IZED DELIVERY, SALE, POSSESSION, OR MANUFACTURE OF A CONTROLLED SUBSTANCE IS A CRIME."

(b) The evidence of payment is valid for thirty (30) days after the payment is received by the department. A

person who receives delivery of, takes possession of, or manufactures a controlled substance must also have a valid evidence of payment in the person's possession.

As added by P.L. 50-1992, SEC. 1. Amended by P.L. 65-1996, SEC. 3.

IC 6-7-3-11

Sec. 11. A person may not deliver, possess, or manufacture a controlled substance subject to the tax under this chapter unless the tax has been paid. A person who fails or refuses to pay the tax imposed by this chapter is subject to a penalty of one hundred percent (100%) of the tax in addition to the tax.

As added by P.L. 50-1992, SEC. 1. Amended by P.L. 65-1996, SEC. 4.

IC 6-7-3-12

Sec. 12. The department may adopt rules under IC 4-22-2 necessary to enforce this chapter, including rules relating to the refunding of taxes paid under this chapter.

As added by P.L. 50-1992, SEC. 1.

IC 6-7-3-13

Sec. 13. An assessment for the tax due under this chapter is considered a jeopardy assessment. The department shall demand immediate payment and take action to collect the tax due as provided by IC 6-8.1-5-3.

As added by P.L. 50-1992, SEC. 1.

IC 6-7-3-14

Sec. 14. All jeopardy assessments issued for nonpayment of tax shall be considered a secondary lien to the seizure and forfeiture provisions of IC 16-42-20, IC 34-24-1, IC 34-24-2, and any federal law. *As added by P.L. 50-1992, SEC. 1. Amended by P.L. 2-1993, SEC. 60; P.L. 1-1998, SEC. 83; P.L. 1-1999, SEC. 17.*

IC 6-7-3-15

Sec. 15. (a) The controlled substance tax fund is established to receive all the revenue collected by the department under this chapter.

(b) The fund shall be administered by the treasurer of state. Any expenses incurred in administering the fund shall be paid from the fund. Any interest earned on money in the fund shall be credited to the fund.

(c) Any revenue remaining in the fund at the end of a state fiscal year does not revert to the state general fund.

(d) Money in the fund is annually appropriated to cover the department's administrative and enforcement expenses under this chapter and to make the distributions required by this chapter.

As added by P.L. 50-1992, SEC. 1.

IC 6-7-3-16

Sec. 16. (a) The department may award up to ten percent (10%) of the total amount collected from an assessment under this chapter to any person who provides information leading to the collection of a tax liability imposed under this chapter. An award made under this

subsection must be made before any other distributions under this section.

(b) Whenever a law enforcement agency provides information leading to the collection of a tax liability imposed under this chapter, the department shall award thirty percent (30%) of the total amount collected from an assessment to the law enforcement agency that provided the information that resulted in the assessment. The law enforcement agency shall use the money the agency receives under this chapter to conduct criminal investigations. A law enforcement agency may not receive an award under more than one (1) subsection.

(c) The department shall award ten percent (10%) of the amount deposited in the fund during each month to the law enforcement training board to train law enforcement personnel.

(d) The department may use twenty percent (20%) of the amount deposited in the fund during a state fiscal year to pay the costs of administration and enforcement of this chapter.

(e) Awards may not be made under this chapter to the following:

(1) A law enforcement officer.

(2) An employee of the department.

(3) An employee of the Internal Revenue Service.

(4) An employee of the federal Drug Enforcement agency.

(f) All the money deposited in the fund that is not needed for awards or to cover the costs of administration

under this chapter shall be transferred to the state drug free communities fund established under IC 5-2-10.

(g) An award made under subsection (a) or (b) shall be made on the basis of collections from each individual assessment that resulted from information supplied to the department by a person or law enforcement agency.

(h) Money shall be considered collected under this section only after all protest periods have expired or all appeals have been adjudicated.

As added by P.L. 50-1992, SEC. 1.

IC 6-7-3-17

Sec. 17. (a) All distributions and transfers from the controlled substance tax fund shall be paid monthly by the fifteenth of the month following the month of collection.

(b) The department shall certify to the auditor of state the amount to be distributed to each law enforcement agency that is entitled to receive an award under section 16 of this chapter. The treasurer of state shall make the distributions upon warrants issued by the auditor of state.

As added by P.L. 50-1992, SEC. 1.

IC 6-7-3-18

Sec. 18. When sentencing a defendant following a prosecution for delivery, possession, or manufacture of a controlled substance in violation of IC 35-48-4, the court may consider evidence of the accused's failure to pay the excise tax required by this chapter. If the court finds that the defendant failed to pay the excise tax, the court may order the department to commence collection proceedings

for the tax and any penalties, as part of the court's sentencing order.

As added by P.L. 65-1996, SEC. 5.

IC 6-7-3-19

Sec. 19. The department may not commence collection proceedings under this chapter unless the department:

(1) is ordered to do so by a court in the court's sentencing order under section 18 of this chapter; or

(2) is notified in writing by the prosecuting attorney of the jurisdiction where the offense occurred that the prosecuting attorney does not intend to pursue criminal charges of delivery, possession, or manufacture of the controlled substance that may be subject to the tax required by this chapter.

As added by P.L. 65-1996, SEC. 6.

IC 6-7-3-20

Sec. 20. The excise taxes required by this chapter are intended to be in addition to any criminal penalties under IC 35-48-4 and forfeitures under IC 16-42-20, IC 34-24-1, or IC 34-24-2 (or IC 34-4-30.1 or IC 34-4-30.5 before their repeal).

As added by P.L. 65-1996, SEC. 7. Amended by P.L. 1-1998, SEC. 84.